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Supreme Court, U.S.
FILED

09-418 OCT 7 - 2009

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No. 09-

IN THE
Supreme Court of the United States

JEFF R. WIECHMANN,
Lieutenant Colonel, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court erred by failing to find that the Convening Authority violated Petitioner's Sixth Amendment Right to Counsel when the Convening Authority refused to recognize one of Petitioner's detailed defense counsel.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTES AND REGULATIONS INVOLVED 1
STATEMENT 2
REASON FOR GRANTING THE PETITION 3

Whether the lower court erred by failing to find that the Convening Authority violated Petitioner's Sixth Amendment Right to Counsel when the Convening Authority refused to recognize one of Petitioner's detailed defense counsel.

CONCLUSION 15
APPENDIX 1a
Court of Appeals for the Armed Forces Decision ... 1a
Relevant Statutes and Rules 24a

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Chapman v. California,
386 U.S. 18 (1967).....9

Gideon v. Wainwright,
372 U.S. 335 (1963).....6, 9

Payne v. Arkansas,
356 U.S. 560 (1958).....9

Tumey v. Ohio,
273 U.S. 510 (1927).....9

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006).....10, 11

Court of Appeals for the Armed Forces

United States v. Brooks,
66 M.J. 221 (C.A.A.F. 2008).....10

United States v. Eason,
21 U.S.C.M.A. 335 (C.M.A. 1972).....8

United States v. Hanson,
24 M.J. 377 (C.M.A. 1987) 8

United States v. Murray,
20 U.S.C.M.A. 61 (C.M.A. 1970).....9

United States v. Spriggs,
52 M.J. 235 (C.A.A.F. 2000).....6, 7, 8

United States v. Tavolilla,
17 U.S.C.M.A. 395 (C.M.A. 1968).....7, 9

United States v. Teller,
13 U.S.C.M.A. 323 (C.M.A. 1962).....9

United States v. Ward,
1 M.J. 176 (C.M.A. 1975) 6

United States v. Wiechmann,
67 M.J. 456 (C.A.A.F. 2009) 2

Courts of Criminal Appeals

United States v. Wiechmann,
No. NMCCA 200700593, 2008 CCA LEXIS 298,
2008 WL 3540244 (N-M. Ct. Crim. App. Aug. 14,
2008) (unpublished).....2

Statutes

10 U.S.C. § 827..... 7

10 U.S.C. § 838..... 7

Other Authorities

95 Cong. Rec. 5718 (1949) 8

Rules

RULE FOR COURTS-MARTIAL 502,
MANUAL FOR COURTS-MARTIAL,
UNITED STATES (2005 ed.) 12, 13

PETITION FOR A WRIT OF CERTIORARI

Lieutenant Colonel Jeff R. Wiechmann, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-23a) is reported at 67 M.J. 456.

JURISDICTION

The decision of the Court of Appeals for the Armed Forces was entered on January 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATUTES AND REGULATIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.

Article 27 and 38 of the Uniform Code of Military Justice, 10 U.S.C. §§ 827 and 838; RULE FOR COURTS-MARTIAL 502, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) are set out in Appendix B.

STATEMENT

Lieutenant Colonel Jeff R. Wiechmann pleaded guilty at a general court-martial to failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery and obstructing justice. In its initial review of the case, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that Petitioner was not deprived of his Sixth Amendment right of counsel of choice, and affirmed Petitioner's conviction. United States v. Wiechmann, No. 200700593, 2008 CCA LEXIS 298, 2008 WL 3540244 (N-M. Ct. Crim. App. Aug. 14, 2008) (unpublished).

On July 9, 2009, the Court of Appeals for the Armed Forces (CAAF) affirmed the lower court. CAAF held that the convening authority erred in treating one of Petitioner's defense counsel as not properly detailed to the case. Assuming this was a Sixth Amendment violation, CAAF held that the error was harmless beyond a reasonable doubt. United States v. Wiechmann, 67 M.J. 456 (C.A.A.F. 2009).

REASON FOR GRANTING THE PETITION

The lower court erred by failing to find that the Convening Authority violated Petitioner's Sixth Amendment Right to Counsel because the Convening Authority refused to recognize one of Petitioner's detailed defense counsel.

Factual Background:

In June 2006, Captain (Capt) Snow, the senior defense counsel at Marine Corps Base Hawaii, learned of an impending Article 32 investigation into charges against Petitioner, and detailed himself as defense counsel in Petitioner's case. App. 4a. Capt Smith had, at that time, one month of experience as defense counsel. *Id.* He requested, through appropriate channels, assistance on the case. Id.

The Chief Defense Counsel of the Marine Corps detailed Lieutenant Colonel (LtCol) Shelburne, a reservist, to serve as Petitioner's defense counsel, in addition to Capt Snow. App. 4a-5a. The convening authority subsequently denied a defense request for funding of LtCol Shelburne's assignment as counsel, stating that he could "find no authority for the Chief Defense Counsel of the Marine Corps to detail LtCol Shelburne to this case." App. 5a. LtCol Shelburne requested a continuance of the Article 32 hearing, noting the funding issue. Id. The convening authority responded that "LtCol Shelburne is not detailed as counsel and has no authority to act in this matter."

On July 24, 2006, LtCol Shelburne appeared at the Article 32 hearing, and objected to the proceeding

based on the detailing of counsel issue. Id. LtCol Shelburne also stated he did not have adequate time to meet with Petitioner or to prepare for the hearing. Id. After consideration of a continuance, the investigating officer decided to proceed, and permitted LtCol Shelburne to participate in the hearing as counsel. Id.

After the Article 32 hearing, LtCol Shelburne and Capt Snow requested a meeting with the convening authority to propose a pretrial agreement that included a proposal for disposition of the case through nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815 (2000). Id. The convening authority denied the request for a meeting, and refused to accept the defense's pretrial agreement documents, on the grounds that LtCol Shelburne's name was on the documents. App. 6a. Capt Snow removed LtCol Shelburne's name from the documents, resubmitted them to the convening authority, and the convening authority accepted them. Id.

The convening authority met with Capt Snow, alone, after denying another request for a meeting with LtCol Shelburne. Id. At the meeting with Capt Snow, the convening authority did not agree to enter into a pretrial agreement or other disposition. Id. On September 25, 2006, the convening authority referred the charges for trial by general-court martial. Id.

After the referral of charges, the military judge initially assigned to the case conducted an informal scheduling conference by telephone, pursuant to Rule for Courts-Martial 802. Id. The military judge denied Capt Snow's request that the military judge include LtCol Shelburne in the scheduling

conference. Id. The defense filed a motion for appropriate relief requesting "that the military judge deny the government motion to prevent LtCol Shelburne from fulfilling his duties as detailed defense counsel." Id.

Subsequently, a different military judge was assigned to the case. Id. At Petitioner's court-martial, the military judge made the standard inquiry of Petitioner regarding representation by counsel, and Petitioner responded that he wished to be represented by LtCol Shelburne as lead defense counsel, and Capt Snow as assistant defense counsel. App. 7a. The military judge, after hearing the parties' argument on the defense motion for appropriate relief, granted the defense motion. Id. The military judge ruled that the applicable departmental regulations authorized the chief defense counsel of the Marine Corps to detail LtCol Shelburne as defense counsel. Id.

The defense moved for a new Article 32 investigation, on the ground that Petitioner did not have the full assistance of LtCol Shelburne during the Article 32 proceedings. Id. The military judge denied this motion. Id. While this motion was pending, the convening authority met with LtCol Shelburne on November 27, 2006, at the request of defense counsel to discuss a possible pretrial agreement and to discuss possible disposition of the case through nonjudicial punishment. Id.

On January 8, 2007, the convening authority and Petitioner entered into a pretrial agreement. Id. Petitioner agreed to plead guilty to all charges except one specification of failing to obey a lawful general order, to waive any defect in the Article 32, UCMJ, pretrial investigation, to waive the right to a board of

inquiry, and to submit a request for immediate retirement at the grade of major. App. 7a-8a.

LtCol Shelburne represented Petitioner at his guilty plea providence inquiry and at the sentencing potion of Petitioner's court-martial. App. 8a. During the inquiry into the plea agreement, the military judge explained the rights Petitioner gave up by pleading guilty. Id. Petitioner indicated that he understood those rights, and that he freely and voluntarily waived those rights. Id. Petitioner confirmed that he was satisfied with both his defense counsel in all respects, that he freely and voluntarily entered into the pretrial agreement, that he understood each and every provision of the agreement, and that he was satisfied that his defense counsel's advice was in his best interest. App. 8a-9a. The military judge accepted Petitioner's pleas, and convicted him of the offenses to which he entered pleas of guilty. App. 9a.

Argument:

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Gideon v. Wainwright, 372 U.S. 335, 339 (1963). In federal civilian criminal prosecutions, the right of an indigent to government compensated counsel extends only to the right to representation by an attorney designated by the government and does not provide the accused with the right to appointment of a particular attorney. United States v. Spriggs, 52 M.J. 235, 237 (C.A.A.F. 2000). However, Congress has provided members of the military with counsel rights broader than those

available to civilians. Spriggs, 52 M.J. at 238. Specifically, military accused have the right to military counsel regardless of indigence and have the right to select a particular military counsel in limited circumstances. Id.

Articles 27 and 38, UCMJ, govern counsel rights before general and special courts-martial. 10 U.S.C. §§ 827, 838 (2006). Article 27 requires the detailing of at least one military defense counsel, but specifically contemplates that more than one counsel may be detailed as assistants. Article 27(a)(1), UCMJ; United States v. Tavolilla, 17 U.S.C.M.A. 395, 398 (C.M.A. 1968). The detailing of counsel was a specific concern of the drafters and Congress when they first enacted the Uniform Code of Military Justice (UCMJ). Specifically, in the Congressional Floor Debate on the Uniform Code of Military Justice, members of the Committee on Armed Services explained how counsel for the accused are to be selected:

> Mr. Elliott (Alabama). Are those counsel drawn from the command of the convening authority or may they be drawn from another command? In other words, how are those able lawyers obtained?
>
> Mr. Vinson (Georgia). It may be from either source. It may be anyone within a certain sphere could be called, whether it is in that particular set-up or some other set-up. In other words, you will find here for the first time in the history of this Government that written into law is every right to protect and see that every accused in the armed

> services has an opportunity to have a fair and impartial trial and have the benefit of qualified people to protect his interest.
>
> Mr. Brooks (Louisiana). May I add that in my judgment and in the judgment of those who sat on the subcommittee, the accused actually has greater opportunity in military trial under this code than he has in a civilian trial in a federal court. His rights are abundantly protected by the restrictions which we place at various parts of this act.

95 Cong. Rec. 5718 (1949) (emphasis added).

The Court of Appeals for the Armed Forces (CAAF) has been extremely protective of the relationship between an accused and his detailed counsel. Spriggs, 52 M.J. at 239 (citing United States v. Hanson, 24 M.J. 377, 379 (C.M.A. 1987)). An accused may not be deprived of the services of his detailed military defense counsel simply because of a routine change in the military attorney's assignment or duty station. United States v. Eason, 21 U.S.C.M.A. 335, (1972). Further, although a financial, logistical, or administrative burden associated with providing representation by military counsel may result, it is the duty and obligation of the government to shoulder that burden. Id. at 340. While certain circumstances (conflicts of interest, counsel leaving active duty) may make it necessary to change or relieve counsel, the rules do not give the convening authority the ability to control counsel in

the exercise of his responsibilities to his client. Tavolilla, 17 U.S.C.M.A. at 399.

In other words, an accused's right to be represented by defense counsel appointed in his behalf is a fundamental principle of due process. United States v. Murray, 20 U.S.C.M.A. 61, 62 (C.M.A. 1970). This right is substantial and extends both to pretrial and the trial proceedings. United States v. Teller, 13 U.S.C.M.A. 323, 327 (C.M.A. 1962).

In this case, Petitioner was denied the representation of LtCol Shelburne throughout the pretrial stages of his case. The convening authority denied LtCol Shelburne's initial funding request, a continuance request, a request for a meeting to present a pretrial agreement proposal, and an additional request for a meeting.

The Supreme Court has indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. Chapman v. California, 386 U.S. 18, 23 (1967) (citing Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963)(denial of right to counsel); and Tumey v. Ohio, 273 U.S. 510 (1927) (lack of impartial judge) as examples of structural defects).

The convening authority's actions of refusing to recognize LtCol Shelburne as detailed defense counsel erroneously deprived Petitioner of his right to the assistance of his detailed defense counsel throughout the pretrial stages of this case. This denial occurred during the critical decision-making process by the convening authority to refer this case to a general court-martial. The lower Court assumed this was a Sixth Amendment violation, but erred by

declining to apply a structural error analysis to this case.

Specifically, CAAF held that the convening authority's actions in the case did not constitute the type of error that is incapable of assessment, and the error was not so fundamental that harmlessness is irrelevant. App. 16a.

Petitioner concedes that the right to counsel of choice does not extend to defendants who require counsel to be appointed to them, as the language of the opinion states, and the lower Court seemed to rely on. Nevertheless, the lower Court erred by not concluding that the deficiencies in this case do not amount to structural error.

Structural error analysis applies to constitutional violations that are not simply an error in the trial process itself and where the error affects the overall framework within which the trial proceeds. Furthermore, structural error analysis is appropriate when a court is faced with the difficulty of assessing the effect of the error in light of the many unquantifiable and indeterminate variables involved in the representation. United States v. Brooks, 66 M.J. 221, 223 (C.A.A.F. 2008) (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 148-50 (2006)).

The failure to recognize LtCol Shelburne as detailed counsel for Petitioner affected the framework within which Petitioner's trial proceeded. As referenced above, the right to detailed defense counsel is a fundamental due process right. Any action by the convening authority that affects an accused's relationship with his detailed counsel strikes at the framework of the military system of justice. CAAF determined that the deficiencies in

this case do not amount to structural error. However, the deficiency denied LtCol Shelburne any opportunity to represent Petitioner before the convening authority. Petitioner had a right to his detailed defense counsel and Petitioner was deprived of that right by the convening authority in this case. Therefore, the lower Court erred by finding no due process violation.

Furthermore, these actions had an unquantifiable and indeterminate effect on LtCol Shelburne's representation of Petitioner and the representation that Petitioner received. In Gonzalez-Lopez, the Supreme Court discussed how different attorneys will pursue different strategies in investigation, discovery, development of theories, and plea bargains, which bears directly on the framework of the trial and whether or not the trial proceeds at all. Gonzalez-Lopez, 548 U.S. at 150. In this case, LtCol Shelburne was not allowed to meet with the convening authority to discuss this case prior to referral, based solely on the fact that the convening authority did not recognize him as counsel. Although there is no requirement that a convening authority meet with counsel, it is reasonable to assume that the convening authority would have met with LtCol Shelburne based on the fact that Capt Snow was given a meeting. This meeting, the pretrial agreement proposals, and objections to the hearing would have been considered in a different light had LtCol Shelburne been properly recognized.

Lastly, this counsel issue became the overarching issue of this case, completely overshadowing Petitioner's misconduct. Numerous hours of research, motions sessions, and lost effort were spent dealing with the counsel issue instead of

the facts and legal issues in Petitioner's case. If LtCol Shelburne had been recognized from the beginning of this case and no issue arose between the convening authority and counsel, there is no telling how this case may have been handled differently. Specifically, there is no telling how the convening authority would have dealt with Petitioner's case if LtCol Shelburne would have been allowed to represent Petitioner before him. Capt Snow did not feel that he could adequately represent Petitioner, yet he was the only counsel that was allowed to meet with the convening authority and represent Petitioner before him. These are the kind of indeterminate and unquantifiable effects that amount to structural error.

Even if this Court determines that the error in this case does not rise to the level of a structural error, the prejudice to Petitioner is not harmless beyond a reasonable doubt. Rule for Courts-Martial 502(d)(6) explains the duties of defense and assistant defense counsel. Specifically, the Rule states that defense counsel shall represent the accused in matters under the code and these rules arising from the offenses suspected or charged. The Manual further states, in discussion section (B) following this Rule, that "Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused." RULE FOR COURTS-MARTIAL 502(d)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2005 ed.), Discussion.

The failure to recognize LtCol Shelburne, lead detailed defense counsel, is not harmless error because it prevented him from representing Petitioner pursuant to this duty. His continuance

request for the Article 32 investigation was denied, as was the pretrial agreement proposal with his name on it, and any attempt he made to meet with the convening authority to discuss this case. In short, the convening authority prevented LtCol Shelburne from guarding the interests of Petitioner in the pretrial stages of this case.

Beyond preventing LtCol Shelburne from representing his client in this case, the convening authority also dictated which counsel would represent Petitioner in this matter. He dictated to Petitioner which counsel he would deal with in the pretrial stages of this case.

Even though Capt Snow did not believe that he could adequately represent Petitioner, and Petitioner requested another counsel, the convening authority still determined that Capt Snow was not only adequate, but the sole representative that he would recognize and negotiate with. Therefore, the convening authority unfairly controlled the pretrial stages of this case by arbitrarily deciding what matters he would consider and from whom he would accept these matters. In short, he placed junior counsel in a difficult position by forcing him to be a conduit for LtCol Shelburne, all while telling him that anything LtCol Shelburne submitted or communicated would not be considered.

Petitioner concedes that an associate counsel, here Capt Snow, may perform any act or duty that a defense counsel may perform under law, regulation, or custom of the service. However, the associate counsel performs under the supervision of the defense counsel, LtCol Shelburne. R.C.M. 506(d)(6). If LtCol Shelburne had voluntarily sent Capt Snow to negotiate the plea deal for Petitioner, there would be

no issue. In this case, however, the convening authority dictated the nature of counsel relationships between defense counsel and Petitioner.

Had LtCol Shelburne been recognized and allowed to represent Petitioner, his request to continue the Article 32 hearing would likely have been accepted, he would have had the opportunity to properly investigate the case before the hearing, and he would have been given the opportunity to represent Petitioner before the convening authority in the pretrial negotiations of this case. Further, Petitioner would not have been forced to endure a "mini-trial" over his counsel rights or been placed in the unenviable position of keeping LtCol Shelburne as lead counsel, even though he knew the convening authority would not allow LtCol Shelburne to represent Petitioner before him.

Because lead detailed defense counsel was denied these opportunities, Petitioner's court-martial was unfair and the denial of his representation was not harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v. Jeff R. WIECHMANN, Lieutenant Colonel U.S. Marine Corps, Appellant

No. 09-0082

Crim. App. No. 200700593

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

67 M.J. 456

Argued April 15, 2009
Decided July 9, 2009

EFFRON, C.J., delivered the opinion of the court, in which BAKER, ERDMANN, and STUCKY, JJ., joined. RYAN, J., filed a separate opinion concurring in the judgment.

Counsel

For Appellant: Captain Kyle R. Kilian (argued).

For Appellee: Lieutenant Timothy H. Delgado (argued); Brian K. Keller, Esq. (on brief).

Military Judge: Bruce D. Landrum

Chief Judge EFFRON delivered the opinion of the court.

A general court-martial composed of a military judge sitting alone convicted Appellant, pursuant to his pleas, of failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice, in violation of Articles 92, 107, 133, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 907, 933, 934 (2000). The sentence adjudged by the court-martial included dismissal and confinement for ninety days. Pursuant to the pretrial agreement, the convening authority suspended all punishment for twelve months from the date of trial. The United States Navy-Marine Corps Court of Criminal Appeals affirmed. United States v. Wiechmann, No. NMCCA 200700593, 2008 CCA LEXIS 298, 2008 WL 3540244 (N-M. Ct. Crim. App. August 14, 2008) (unpublished).

On Appellant's petition, we granted review of the following issue:

> WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN THE CONVENING AUTHORITY AND STAFF JUDGE ADVOCATE FAILED TO RECOGNIZE ONE OF HIS TWO DETAILED DEFENSE COUNSEL.

For the reasons set forth below, we conclude that the convening authority erred in treating one of Appellant's defense counsel as not properly detailed. Under the circumstances of this case, we further conclude that the error was harmless beyond a reasonable doubt.

I. BACKGROUND

A. DETAIL OF DEFENSE COUNSEL

The accused has the right to be represented by counsel during an investigation under Article 32, UCMJ, 10 U.S.C. § 832 (2000), and before a general or special court-martial. Article 38(b)(1), UCMJ, 10 U.S.C. § 838(b)(1) (2000). See U.S. Const. amend. VI; United States v. Davis, 60 M.J. 469, 473 (2005). In the military justice system, the right to counsel includes the right to counsel detailed under Article 27, UCMJ, 10 U.S.C. § 827 (2000). The right to the services of detailed counsel "is substantial, and extends to both the pretrial and the trial proceedings." United States v. Tellier, 13 C.M.A. 323, 327, 32 C.M.R. 323, 327 (1962). See United States v. Eason, 21 C.M.A. 335, 337-39, 45 C.M.R. 109, 111-13 (1972).

Under Article 27(a)(1), UCMJ, the secretaries of the military departments prescribe regulations governing the detail of military counsel. Although the accused does not have the right to more than one detailed counsel, "the person authorized by regulations prescribed under section 827 of this title (Article 27) to detail counsel, in his sole discretion . . . may detail additional military counsel as assistant defense counsel." Article 38(b)(6), UCMJ, 10 U.S.C. § 838(b)(6) (2000).

The authority to assign detailed defense counsel to a particular case is vested in the official designated under departmental regulations, and the accused is not entitled to detailed counsel of choice under Article 27(a). Compare Article 38(b), UCMJ, 10 U.S.C. § 838(b) (2000) (setting forth the right to representation by civilian counsel if provided by the accused and the right to representation by military

counsel selected by the accused if reasonably available under departmental regulations). Although the accused does not have the right to detailed counsel of choice, once counsel has been detailed under Article 27(a) and an attorney-client relationship has been established, the convening authority may not undermine that relationship. See Rule for Courts-Martial (R.C.M.) 505(d)(2); Eason, 21 C.M.A. at 339-40, 45 C.M.R. at 113-14. The responsibility for any changes in the assignment of detailed counsel is vested in the authority competent to detail such counsel under departmental regulations, not the convening authority, and may be exercised only for good cause shown on the record or under the other limited circumstances provided in R.C.M. 505(d)(2)(B).

In June 2006, Captain Snow, the senior defense counsel at Marine Corps Base Hawaii, learned of an impending Article 32 investigation into charges against Appellant. Captain Snow detailed himself as defense counsel and requested a continuance of the investigation, which was granted. At that time, Captain Snow, who had one month of experience as defense counsel, expressed through defense counsel channels his need for assistance, noting Appellant's retirement-eligible status. Captain Snow began to explore the possibility that Appellant would request a specific individual military counsel at government expense or obtain civilian counsel at Appellant's own expense. See Article 38(b)(2)-(3), UCMJ.

The chief defense counsel of the Marine Corps detailed Lieutenant Colonel (LtCol) Shelburne, a reservist, to serve as Appellant's defense counsel, thereby providing Appellant with both Captain Snow

and LtCol Shelburne as detailed defense counsel. The convening authority subsequently denied a defense request for funding of LtCol Shelburne's assignment, stating that he could "find no authority for the Chief Defense Counsel of the Marine Corps to detail LtCol Shelburne to this case." LtCol Shelburne then requested a continuance of the Article 32 hearing, noting the funding issue. The convening authority responded that "LtCol Shelburne is not detailed as counsel and has no authority to act in this matter."

B. REPRESENTATION OF APPELLANT AT THE ARTICLE 32 HEARING AND PRIOR TO REFERRAL OF CHARGES

On July 24, 2006, LtCol Shelburne appeared at the Article 32 hearing, objecting to the proceeding on the grounds that efforts were underway to address the counsel issue. He also stated that he did not have adequate time to meet with Appellant or to prepare for the hearing. After consideration of a brief delay, the investigating officer decided to proceed, while permitting LtCol Shelburne to represent Appellant over objection by the Government's representative. Following the hearing, LtCol Shelburne submitted objections to the investigating officer regarding the decision to proceed, as well as the decision to admit into evidence certain unsworn statements.

LtCol Shelburne and Captain Snow subsequently requested a meeting with the convening authority to propose a pretrial agreement package, which included a proposal for disposition under Article 15, UCMJ, 10 U.S.C. § 815 (2000) (nonjudicial punishment). The convening authority

denied the request for the meeting and refused to accept the pretrial agreement package on the ground that LtCol Shelburne had not been properly detailed as defense counsel. After Captain Snow removed LtCol Shelburne's name from the package, the convening authority accepted the paperwork for consideration.

After the convening authority denied a further request from LtCol Shelburne for a meeting, the convening authority met with Captain Snow alone to discuss Appellant's case and the request for disposition under Article 15. The convening authority at that time did not agree to enter into a pretrial agreement or other disposition. On September 25, 2006, the convening authority referred the charges for trial by general court-martial.

C. REPRESENTATION OF APPELLANT AT THE COURT-MARTIAL

After the charges were referred to trial, the military judge initially assigned to the case conducted an informal scheduling conference by telephone under R.C.M. 802. The military judge denied Captain Snow's request that the military judge include LtCol Shelburne in the discussion and suggested that Captain Snow submit a request for individual military counsel if he wanted LtCol Shelburne to be recognized. The defense filed a motion for appropriate relief requesting "that the military judge deny the government motion to prevent LtCol Shelburne from fulfilling his duties as detailed defense counsel."

Subsequently, a different military judge was assigned to the case. At the opening session of

Appellant's court-martial, the military judge made the standard inquiry of Appellant regarding representation by counsel. Appellant noted that he wished to be represented by LtCol Shelburne as lead detailed defense counsel and by Captain Snow as assistant defense counsel. After arraignment, the military judge heard the parties' arguments on the defense motion for appropriate relief.

The military judge granted the defense motion, ruling that the applicable departmental regulations authorized the chief defense counsel of the Marine Corps to detail LtCol Shelburne as defense counsel. The military judge also interpreted applicable regulations as providing that LtCol Shelburne's assignment would be funded by Headquarters Marine Corps rather than by the convening authority.

In a separate filing, the defense moved to dismiss the charges based on allegations of unlawful command influence. In addition, the defense moved for a new Article 32 investigation on the ground that Appellant did not have the full assistance of LtCol Shelburne during the Article 32 proceedings. The military judge eventually denied both motions.

While these motions were pending, the convening authority met with LtCol Shelburne on November 27, 2006, at the request of defense counsel to discuss possible disposition through nonjudicial punishment. LtCol Shelburne also entered into negotiations with the convening authority and his representatives about a possible pretrial agreement.

The convening authority and Appellant entered into a pretrial agreement on January 8, 2007. Appellant agreed to plead guilty to all charges except for one specification of failing to obey a lawful

general order, to waive any defect in the Article 32, UCMJ, pretrial investigation, to waive the right to a board of inquiry, and to submit a request for immediate retirement at the grade of major. The convening authority agreed to suspend any confinement and punitive discharge adjudged.

LtCol Shelburne represented Appellant at Appellant's guilty plea providence inquiry and at sentencing on January 10, 2007. During the inquiry into the plea agreement, the military judge explained that by pleading guilty, Appellant would forfeit the right to appeal the military judge's decisions on the previous motions made in his case, except for the unlawful command influence motion. Appellant agreed that he was voluntarily waiving the right to appeal the prior motions. Appellant stated that he freely and voluntarily agreed to each of the specially negotiated provisions of the pretrial agreement. These provisions included the waiver of any defect in the Article 32 investigation. The military judge told Appellant that the waiver provision "might be superfluous in light of the fact that the guilty plea waived the appeal of the motion. However, this basically states your clear understanding and your waiver of any defect that there might have been in that Article 32. Do you understand that?" Appellant replied "Yes," and he also replied "Yes" when asked if it was his intention to waive any defect in the Article 32 investigation.

Appellant confirmed that he was satisfied with his defense counsels "in all respects" and that he had entered into the pretrial agreement freely and voluntarily. Appellant replied "yes," when asked whether he understood "each and every provision" of the pretrial agreement. The military judge asked,

"Have you fully discussed this agreement with your counsel, and are you satisfied that their advice has been in your best interests?" Appellant replied "Yes." The military judge accepted Appellant's pleas and convicted Appellant of the offenses to which he entered guilty pleas.

D. CONSIDERATION BY THE COURT OF CRIMINAL APPEALS

Appellant alleged multiple assignments of error before the Court of Criminal Appeals, including that the convening authority's refusal to recognize LtCol Shelburne as detailed defense counsel prior to the military judge's ruling on that issue violated Appellant's Sixth Amendment right to counsel and improperly severed his attorney-client relationship with LtCol Shelburne. Wiechmann, 2008 CCA LEXIS 298, at *1-*3, 2008 WL 3540244 at *1.

In the course of addressing these issues, the Court of Criminal Appeals found that LtCol Shelburne had established an attorney-client relationship with Appellant by the time of the Article 32 investigation. Id. at *8, 2008 WL 3540244, at *3. The court described the pretrial dispute about the validity of LtCol Shelburne's status as a "good faith" disagreement "over how to interpret the detailing directives," while noting that the convening authority's initial refusal to recognize LtCol Shelburne as detailed defense counsel "burdened his ability to represent the appellant pretrial." Id. at *9, 2008 WL 3540244, at *3. The court concluded, however, that the convening authority's actions "were not so severe as to constitute a severance of the attorney-client relationship, nor did they rise to such a level as to deny appellant due process." Id. at

*5-*9, 2008 WL 3540244, at *1-*3. The court added that Appellant did not have the right to a pretrial meeting with the convening authority, that he benefited from the advice of LtCol Shelburne, and that Captain Snow served as a "conduit" to the convening authority until LtCol Shelburne was recognized. Id. at *9, 2008 WL 3540244, at *3.

II. DISCUSSION

A. PRE-REFERRAL RESPONSIBILITIES OF THE CONVENING AUTHORITY

The granted issue asks whether the convening authority's refusal to treat LtCol Shelburne as detailed defense counsel violated Appellant's Sixth Amendment right to counsel. In assessing whether there has been a Sixth Amendment violation, we begin by considering the stage of the proceedings in which the acts or omissions at issue occurred. In the present appeal, the granted issue concerns the convening authority's acts and omissions during the pre-referral stage of the proceedings.

Because a military judge is not appointed to conduct proceedings until charges are referred to a court-martial, see Article 26(a), UCMJ, 10 U.S.C. § 826(a) (2000), the military justice system does not have standing courts at the trial level to address legal issues at the pre-referral stage. The convening authority exercises responsibility for pretrial matters that would otherwise be litigated before a judge in civilian proceedings, including issues involving the conduct of depositions, issuance of protective orders, availability of government-funded experts, mental responsibility proceedings, and questions concerning the validity of charges. See, e.g., Article 34, UCMJ, 10 U.S.C. § 834 (2000); R.C.M. 405(g)(6), 406, 407,

702(b), 703(d), 706(b)(1).

Pretrial agreements also implicate distinctive responsibilities of the convening authority with respect to court-martial proceedings. In the military justice system, responsibility for the function of determining sentencing is shared by the court-martial, see Article 51, UCMJ, 10 U.S.C. § 851 (2000) (governing the determination of the sentence by the court-martial), and the convening authority, see Article 60, UCMJ, 10 U.S.C. § 860 (2000) (providing the convening authority with virtually unfettered discretion to modify the sentence so long as the severity is not increased). As an incident of the responsibility for sentencing, the convening authority may enter into a pretrial agreement that imposes a legal limitation on the scope of the sentence. See R.C.M. 705(b)(2)(E). R.C.M. 705 underscores the vital role of counsel at the pretrial stage of the proceedings: "Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel." R.C.M. 705(d)(1). The rule further provides that a pretrial agreement "shall be signed by the accused and defense counsel, if any." R.C.M. 705(d)(2).

B. NONRECOGNITION OF DETAILED DEFENSE COUNSEL BY THE CONVENING AUTHORITY

A convening authority may not interfere with or impede an attorney-client relationship established between an accused and detailed defense counsel. See supra Part I.A. Although LtCol Shelburne was detailed as Appellant's defense counsel, the convening authority declined to recognize LtCol Shelburne during the Article 32 investigation period in which Appellant was entitled to representation by

detailed defense counsel under Articles 32(b) and 38(b)(1), UCMJ, 10 U.S.C. §§ 832(b), 838(b)(1) (2000). The convening authority continued to do so during initial pretrial agreement negotiations, a period in which the Government was obligated to conduct any negotiations with defense counsel. See R.C.M. 705(d)(1). After the convening authority referred the case to trial, he persisted in refusing to recognize LtCol Shelburne as Appellant's counsel until that point in the court-martial proceedings when the military judge ruled that LtCol Shelburne had been properly detailed as defense counsel under Articles 27 and 38, UCMJ.

As noted in the previous section, the convening authority exercises significant pretrial responsibilities in the military's criminal justice system. The responsibility for detailing defense counsel, however, is not one of the duties assigned to the convening authority by law. Although the UCMJ, as originally enacted, authorized the convening authority to detail counsel, Congress amended the statute in 1983 to provide that the responsibility for detailing counsel would be exercised by persons authorized to do so under departmental regulations. Compare Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107, 117 (Article 27(a)), with Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 1394 (Article 27(a)). See S. Rep. No. 98-53, at 13 (1983) (noting that "in addition to removing . . . potential burdens, eliminating the requirement for the convening authority to personally detail . . . counsel will remove any hint or possibility of improper command influence or control . . . ."). The regulations at issue in the present case vested the responsibility for detailing counsel in various

department-level officers, not in the convening authority. See Dep't of the Navy, Marine Corps Order P5800.16A, Marine Corps Manual for Legal Administration, para. 2002 (Aug. 31, 1999); Dep't of the Navy, Judge Advocate General Instr. 5800.7D, Manual of the Judge Advocate General para. 0130 (Mar. 15, 2004).

In the present case, the convening authority, who did not seek clarification of the department's regulations from officials at the departmental level, proceeded with the case while declining to recognize LtCol Shelburne as Appellant's detailed defense counsel. Eventually, the military judge ruled that LtCol Shelburne had been properly detailed as defense counsel, effective as of the date of LtCol Shelburne's initial detail as Appellant's defense counsel. As neither party has challenged the military judge's interpretation of departmental regulations on appeal, we treat his ruling as the law of the case. See United States v. Parker, 62 M.J. 459, 464 (C.A.A.F. 2006). In that context, the convening authority erred by restricting the role of Appellant's detailed defense counsel during the pretrial proceedings, including the proceedings concerning the Article 32 investigation and pretrial agreement negotiations. In so doing, the convening authority improperly interfered with the attorney-client relationship established at the time of LtCol Shelburne's initial detail as Appellant's defense counsel. These actions violated Appellant's rights under Article 27, UCMJ.

C. LIMITATIONS ON PARTICIPATION OF DETAILED DEFENSE COUNSEL IN THE PRETRIAL AND TRIAL PROCEEDINGS

Captain Snow, the first detailed defense counsel, represented Appellant throughout the pretrial and trial proceedings. LtCol Shelburne, the second detailed defense counsel, participated in the Article 32 proceedings, submitted comments to the Article 32 investigating officer, and assisted Captain Snow in preparing the first pretrial packet for submission to the convening authority. After the military judge's order that he was properly detailed, LtCol Shelburne served as lead defense counsel, participating fully in the negotiation of the plea agreement and subsequent trial and post-trial proceedings.

LtCol Shelburne and Appellant had established an attorney-client relationship by the time of the Article 32 investigation. See Wiechmann, 2008 CCA LEXIS 298, at *8, 2008 WL 3540244, at *3. In that context, the Court of Criminal Appeals observed that the convening authority's "initial refusal to recognize LtCol Shelburne burdened [LtCol Shelburne's] ability to represent the appellant pretrial." Id. at *9, 2008 WL 3540244, at *3. We agree. The convening authority's action burdened LtCol Shelburne's representation of Appellant in several respects: (1) the Article 32 proceeding was conducted without a full opportunity for LtCol Shelburne to prepare and participate; (2) LtCol Shelburne was excluded from pretrial disposition negotiations that the Government conducted with Captain Snow, the less experienced defense counsel; (3) LtCol Shelburne was unable to represent Appellant in pretrial procedural matters, such as in a scheduling conference or by requesting a continuance. Under these circumstances, the Government's actions infringed Appellant's right to

the assistance of counsel under Article 27 during pretrial proceedings before both the convening authority and the military judge. See Tellier, 13 C.M.A. at 327, 32 C.M.R. at 327; Eason, 21 C.M.A. at 335-37, 45 C.M.R. at 109-11.

D. EVALUATION OF ERROR AND PREJUDICE

Having found a violation of Appellant's statutory right to counsel, we now turn to Appellant's constitutional claims. When a Sixth Amendment claim involves a governmental act or omission affecting the right of an accused to the assistance of counsel, we consider whether the infringement involves a structural error -- an error so serious that no proof of prejudice is required -- or whether the error must be tested for prejudice. See United States v. Brooks, 66 M.J. 221, 223-24 (C.A.A.F. 2008). Compare Davis, 60 M.J. at 473 (discussing separate standards applicable to claims of ineffective assistance of counsel). Structural error exists when "a court is faced with 'the difficulty of assessing the effect of the error'" or the error is so fundamental that "harmlessness is irrelevant." Brooks, 66 M.J. at 224 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

As we noted in Brooks: "'Structural errors involve errors in the trial mechanism' so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" 66 M.J. at 224 (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991)). We further noted that "[t]here is a strong presumption that an error is not structural." 66 M.J. at 224 (citations and quotation marks omitted).

In the present case, Appellant had the services

of qualified counsel, Captain Snow, throughout the proceedings. Captain Snow had the assistance of LtCol Shelburne in addressing pretrial matters. To the extent that the convening authority's restrictions on LtCol Shelburne adversely affected Appellant's rights during the Article 32 proceeding, Appellant subsequently entered into a plea agreement -- with the assistance of LtCol Shelburne -- that expressly waived any defects in the Article 32 proceeding. Likewise, to the extent that the convening authority's actions restricted Appellant's rights during the initial pretrial agreement negotiations, Appellant had the benefit of LtCol Shelburne's unrestricted assistance during the subsequent negotiations, completion of the agreement, entry of pleas, and other trial and post-trial proceedings. Under these circumstances, the initial restrictions did not significantly affect "the framework within which the trial proceed[ed]." See Gonzalez-Lopez, 548 U.S. at 148; Brooks, 66 M.J. at 224. The convening authority's actions in the present case do not constitute the type of error that is incapable of assessment, and the error is not so fundamental that harmlessness is irrelevant. See Gonzalez-Lopez, 548 U.S. at 148-49; Brooks, 66 M.J. at 224. Under these circumstances, the deficiencies in the present case do not amount to structural error.

Appellant contends that the infringement of his Sixth Amendment rights, even if not structural error, constituted prejudicial error. In particular, Appellant contends that the infringement adversely affected Appellant's rights during the Article 32 proceeding and during the initial pretrial agreement negotiations.

The infringement of Appellant's rights in this

case constituted a trial error that can be "'quantitatively assessed in the context of other evidence.'" Gonzalez-Lopez, 548 U.S. at 148 (quoting Fulminante, 499 U.S. at 307-08). In that posture, "we shall assume, without deciding, that the Sixth Amendment was violated in the circumstances of this case." United States v. Morrison, 449 U.S. 361, 364 (1981). Assuming that the error is of constitutional dimension, we assess whether it was harmless beyond a reasonable doubt. See United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)) (applying the harmless beyond a reasonable doubt standard to certain constitutional errors).

As previously noted, after the military judge's ruling at the outset of the trial proceedings that confirmed LtCol Shelburne's status as lead detailed defense counsel, LtCol Shelburne represented Appellant fully as lead defense counsel throughout the trial and post-trial proceedings. Appellant, with the assistance of LtCol Shelburne as lead counsel, entered into a pretrial agreement that expressly waived any error in the Article 32 investigation. Moreover, as lead counsel, LtCol Shelburne had the opportunity to engage in negotiations with the convening authority regarding the defense request for nonjudicial disposition as well as the terms of the pretrial agreement. Appellant has claimed no measurable prejudice from the inability of LtCol Shelburne to participate in the initial scheduling conference under R.C.M. 802, nor has Appellant claimed that his plea was involuntary or that the providency inquiry was otherwise deficient. Under these circumstances, we conclude that the convening authority's erroneous action with respect to the

status of LtCol Shelburne during the pretrial proceedings was harmless beyond a reasonable doubt.

III. CONCLUSION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

RYAN, Judge (concurring in the judgment):

I agree with the majority's conclusion that "the convening authority erred by restricting the role of Appellant's detailed defense counsel during the pretrial proceedings, including the proceedings concerning the Article 32 investigation and pretrial agreement negotiations." United States v. Wiechmann, __ M.J. __, __ (15) (C.A.A.F. 2009). I write separately because I do not believe, as the majority opinion "'assume[s] without deciding,'" id. at __ (19-20) (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)), that the convening authority's refusal to recognize the power vested in and exercised by the detailing authority by statute, see Article 38(b)(6), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 838 (2000) (providing that the detailing authority "in his sole discretion" may choose to appoint a second defense counsel), qualifies as constitutional error.

Because the Government does not challenge the conclusion by the Court of Criminal Appeals that the convening authority's refusal to recognize Lieutenant Colonel (Lt. Col.) Shelburne burdened his attempts to fully represent Appellant, I, like the majority, accept that conclusion as the law of the case. United States v. Parker, 62 M.J. 459, 464

(C.A.A.F. 2006) ("When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case."). But Appellant has likewise not disputed that during all times in which Lt. Col. Shelburne's participation was limited, Appellant was fully represented by Captain (Capt.) Snow. At oral argument, Appellant conceded that Capt. Snow was competent and qualified to be his defense counsel; that at all times he had effective assistance of counsel; and that there was no instance in which Capt. Snow's representation was deficient. While I believe reaching the constitutional issue at all to be unnecessary, under the circumstances of this case there is no basis for even suggesting that Appellant's Sixth Amendment rights were violated by the limitations placed on Lt. Col. Shelburne.

The Sixth Amendment guarantees that "'[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.' The core of this right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.'" Kansas v. Ventris, 129 S. Ct. 1841, 1844-45 (2009) (citation omitted) (brackets and ellipsis in original). But "[n]ot every restriction on counsel's time or opportunity to investigate or consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11, 13-14 (1983) (finding there is no Sixth Amendment right to "a meaningful attorney-client relationship" and that denial of a continuance to give an attorney who was appointed to appellant's case six days before trial more time to prepare was not an abuse of discretion).

Further, as the majority acknowledges, a military accused has neither the absolute right to detailed counsel of choice, nor the right to the assistance of two counsel. Wiechmann, __ M.J. at __ (3-4); see Article 38(b)(3)(B), UCMJ ("The accused may be represented by military counsel of his own selection if that counsel is reasonably available" as determined by applicable service regulations); Article 38(b)(6), UCMJ ("The accused is not entitled to be represented by more than one military counsel.").

The scenario in which a defendant has two attorneys and one is prevented from participating in a particular stage of the proceedings appears to be a rare subject of litigation in the federal courts. One situation where it has arisen is when defense counsel has requested a continuance to allow both counsel to be present. On appeal, the reviewing courts have applied an abuse of discretion standard without any mention of the Sixth Amendment. United States v. Riccobene, 709 F.2d 214, 231 (3d Cir. 1983); United States v. McManaman, 653 F.2d 458, 460-61 (10th Cir. 1981). In both Riccobene and McManaman, the court found no abuse of discretion both because the second and participating attorney was qualified and competent to represent the accused and because there was no assertion that the resulting representation was inadequate or ineffective. See Riccobene, 709 F.2d at 231 (finding no abuse of discretion because appellant's "other attorney had the experience and capability to represent" appellant and because appellant "d[id] not claim [his] representation was in any way inadequate"); McManaman, 653 F.2d at 460 (finding no abuse of discretion because attorney who was available when the trial began was competent and well-prepared and

because "there [was] no real suggestion that [appellant] did not receive the assistance of competent counsel at his trial"). Similarly, in this case, Appellant was at all times represented by at least one counsel he conceded was competent, and there is no allegation of ineffective representation at any stage of the proceedings.

Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians. See, e.g., United States v. Johnson, 21 M.J. 211, 213 (C.M.A. 1986) ("[O]ur starting premise is that Congress intended to bestow on servicemembers a right to counsel unparalleled in civilian criminal trials."). But these broader rights are the creations of statute and regulation, not of the Constitution. See id. at 213-15 (discussing rights guaranteed by Article 38, UCMJ); United States v. Gnibus, 21 M.J. 1, 5-7 (C.M.A. 1985) (discussing history of right to counsel in the military as defined by the UCMJ and its statutory predecessors).

Article 38(b)(6), UCMJ, provides that "the person authorized under regulations prescribed under [Article 27, UCMJ, 10 U.S.C. § 827 (2000)] to detail counsel in his sole discretion may detail additional military counsel" to an accused. I agree that a convening authority who does not honor such an additional detailing has erred. Once a defense counsel has been detailed under Article 38, UCMJ, and an attorney-client relationship has been established, only the detailing authority may sever that relationship, and only then under limited circumstances. See Rule for Courts-Martial (R.C.M.) 505(d)(2) (outlining circumstances in which the detailing authority, not the convening authority, may excuse or change defense counsel once that counsel

has formed an attorney-client relationship with the accused).

However, under the facts of this case, I cannot agree with the suggestion that this error could be a Sixth Amendment violation or an infringement of "Appellant's right to the assistance of counsel under Article 27," as the majority concludes. Wiechmann, __ M.J. at __ (17, 19-20). The majority's suggestion that interference with one counsel while Appellant was fully represented by a second competent counsel could constitute a Sixth Amendment violation is both incorrect and an unnecessary assumption, given the statutory violation we all agree exists. Nor do United States v. Eason, 21 C.M.A. 335, 45 C.M.R. 109 (1972), and United States v. Tellier, 13 C.M.A. 323, 32 C.M.R. 323 (1962), offer any support for a Sixth Amendment inquiry: Neither case presented the issue of severance of an attorney-client relationship in the context of an Article 27, UCMJ, "assistance of counsel" or Sixth Amendment claim. Instead, both cases were grounded in the statutory question whether the appellant's rights under Article 38, UCMJ, had been violated. Eason, 21 C.M.A. at 339-40, 45 C.M.R. at 113-14 (upholding Court of Military Review conclusion that there was prejudice in the government's refusal to appoint appellant's personally selected military counsel in violation of Article 38, UCMJ); Tellier, 13 C.M.A. at 326-28, 32 C.M.R. at 326-28 (emphasizing that precedent from the boards of review and "the clear and unequivocal command of the statute's language" lead to the conclusion that "an accused is entitled as a matter of right to the association of his appointed defense

counsel with his individually employed attorneys").[1]

In this case, the chief defense counsel of the Marine Corps detailed an additional military counsel, Lt. Col. Shelburne, to Appellant's case. Because the convening authority declined to accept this detailing as valid, he improperly refused to recognize authority conferred solely on the detailing authority by Article 38, UCMJ, and R.C.M. 505. As an error under the UCMJ and the Rules for Courts-Martial, it should be assessed under Article 59, UCMJ, 10 U.S.C. § 859 (2000), to determine whether the error materially prejudiced Appellant's "substantial rights."

For the same reasons cited by the majority in support of its conclusion that the error was harmless beyond a reasonable doubt, I agree that there was no material prejudice to Appellant's substantial rights. Wiechmann, __ M.J. at __ (19-21). I respectfully concur in the judgment.

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[1] Of course, both cases were decided under a prior version of Article 38, UCMJ, which was interpreted to establish a statutory right to representation by two military counsel. See Article 38(b), UCMJ, 10 U.S.C. § 838(b) (1964) ("Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed shall, if the accused so desires, act as his associate counsel.") (emphasis added). A subsequent revision of Article 38, UCMJ, clarified the fact that a military member is not entitled to two military counsel, although the person authorized under the applicable service regulations to detail counsel may detail a second military counsel "in his sole discretion." Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4(b), 95 Stat. 1085, 1088.

APPENDIX B

1. 10 U.S.C. 827 provides:

§ 827. Art. 27. Detail of trial counsel and defense counsel

(a) (1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.

(2) No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial--

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial-

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title [10 USCS § 827(b)] (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by

the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

2. 10 U.S.C. 838 provides:

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b) (1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title [10 USCS § 832] (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented--

(A) by military counsel detailed under section 827 of this title [10 USCS § 827] (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title [10 USCS § 827] (article 27) to detail counsel, in his sole discretion--

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available"

for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel--

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title [10 USCS § 860] (article 60); and

(3) may take other action authorized by this chapter [10 USCS §§ 801 et seq.].

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title [10 USCS § 827] (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title [10 USCS § 827] (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

3. RULE FOR COURTS-MARTIAL 502, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) provides:

Rule 502. Qualifications and duties of personnel of courts-martial

(a) *Members.*

(1) *Qualifications.* The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) A commissioned officer;

(B) A warrant officer, except when the accused is a commissioned officer; or

(C) An enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

Discussion

Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty.

Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force. The Public Health Service includes both commissioned and warrant officers. The National Oceanic

and Atmospheric Administration includes only commissioned officers.

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(2) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special court-martial without a military judge may use such materials in open session.

Discussion

Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for

determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion on any matter in connection with a case until that matter has been submitted to them for determination.

(b) *President.*

(1) *Qualifications.* The president of a court-martial shall be the detailed member senior in rank then serving.

(2) *Duties.* The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations;

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) *Qualifications of military judge.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a

member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts - martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 801 for description of some of the general duties of the military judge.

Military judges assigned as general court-martial judges may perform duties in addition to the primary duty of judge of a general court-martial only when such duties are assigned or approved by the Judge Advocate General, or a designee, of the service of which the military judge is a member. Similar restrictions on other duties which a military judge in special

courts-martial may perform may be prescribed in regulations of the Secretary concerned.

(d) *Counsel.*

(1) *Certified counsel required.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.

Discussion

To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification.

When the accused has individual military or civilian defense counsel, the detailed counsel is "associate counsel" unless excused from the case. *See* R.C.M. 506(b)(3).

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(2) *Other military counsel.* Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) *Qualifications of individual military and civilian defense counsel.* Individual military or civilian defense counsel who represents an accused in a court-martial shall be:

(A) A member of the bar of a Federal court or of the bar of the highest court of a State; or

(B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

Discussion

In making such a determination—particularly in the case of civilian defense counsel who are members only of a foreign bar—the military judge also should inquire into:

(i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;

(ii) whether the accused wants the counsel to appear with military defense counsel;

(iii) the familiarity of the counsel with spoken English;

(iv) practical alternatives for discipline of the counsel in the event of misconduct;

(v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and

(vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

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(4) *Disqualifications.* No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) The accuser;

(B) An investigating officer;

(C) A military judge; or

(D) A member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the court-martial to which the case has been referred, has acted in that capacity.

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(5) *Duties of trial and assistant trial counsel.* The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

Discussion

(A) *General duties before trial.* Immediately upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused. *See* R.C.M. 602.

Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (*see* R.C.M. 603); and assure that the information about the accused on the

charge sheet and any evidence of previous convictions are accurate.

(B) *Relationship with convening authority.* Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members below quorum to the convening authority; bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

(C) *Relations with the accused and defense counsel.* Trial counsel must communicate with a represented accused only through the accused's defense counsel. However, *see* R.C.M. 602. Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) Preparation for trial. Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having

custody of the accused is also informed; comply with applicable discovery rules (see R.C.M. 701); prepare to make a prompt, full, and orderly presentation of the evidence at trial; consider the elements of proof of each offense charged, the burden of proof of guilt and the burdens of proof on motions which may be anticipated, and the Military Rules of Evidence; secure for use at trial such legal texts as may be available and necessary to sustain the prosecution's contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution's case (see R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (see R.C.M. 919; 1001(g)).

(E) *Trial.* Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(F) *Post-trial duties.* Trial counsel must promptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander , and (if applicable) the officer in charge of the confinement facility (*see* R.C.M. 1101 (a)), and supervise the preparation, authentication, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (*see* R.C.M. 1103; 1104).

(G) *Assistant trial counsel.* An assistant trial counsel may act in that capacity only under the supervision of the detailed trial counsel. Responsibility for trial of a case may not devolve to an assistant not qualified to serve as trial counsel. Unless the contrary appears, all acts of an assistant trial counsel are presumed to have been done by the direction of the trial counsel. An assistant trial counsel may not act in the absence of trial counsel at trial in a general court-martial unless the assistant has the qualifications required of a trial counsel. *See* R.C.M. 805(c).

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(6) *Duties of defense and associate or assistant defense counsel.* Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the

supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

Discussion

(A) Initial advice by military defense counsel. Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the rights to request individual military counsel of the accused's own selection, and of the effect of such a request, and to retain civilian counsel. If the accused wants to request individual military counsel, the defense counsel should immediately inform the convening authority through trial counsel and, if the request is approved, serve as associate counsel if the accused requests and the convening authority permits. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for individual military counsel or retention of civilian counsel. See R.C.M. 506.

(B) *General Duties of Defense Counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to

personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See* R.C.M. 901(d)(4)(D).

Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election (see R.C.M. 903); the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the rights to introduce evidence, to testify or remain silent, and to assert any available defense; and the rights to present evidence during sentencing and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These

explanations must be made regardless of the intentions of the accused as to testifying and pleading.

Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) *Preparation for trial.* Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense. *See* R.C.M. 703.

Defense counsel should consider the elements of proof of the offenses alleged and the pertinent rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution.

Defense counsel should: prepare to make an opening statement of the defense case (*see* R.C.M. 913(b)); and prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (*see* R.C.M. 919; 1001(g)).

(D) *Trial.* Defense counsel should represent and protect the interests of the accused at trial.

When a trial proceeds in the absence of the accused, defense counsel must continue to represent the accused.

(E) *Post-trial duties.*

(i) Deferment of confinement. If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. See R.C.M. 1101(c).

(ii) *Examination of the record; appellate brief.* The defense counsel should in any case examine the record for accuracy and note any errors in it. This notice may be forwarded for attachment to the record. *See* R.C.M. 1103(b)(3)(C). *See* also R.C.M. 1103(i)(1)(B).

(iii) *Submission of matters.* If the accused is convicted, the defense counsel may submit to the convening authority matters for the latter's consideration in deciding whether to approve the sentence or to disapprove any findings. *See* R.C.M. 1105. Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) *Appellate rights.* Defense counsel must explain to the accused the rights to appellate review that apply in the case, and advise the accused concerning the exercise of those rights. If the case is subject to review by the Court of Criminal

Appeals, defense counsel should explain the powers of that court and advise the accused of the right to be represented by counsel before it. See R.C.M. 1202 and 1203. Defense counsel should also explain the possibility of further review by the Court of Appeals for the Armed Forces and the Supreme Court. See R.C.M. 1204 and 1205. If the case may be examined in the office of the Judge Advocate General under Article 69(a), defense counsel should explain the nature of such review to the accused. See R.C.M. 1201 (b)(1). Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver. See R.C.M. 1110. If the accused waives appellate review, or if it is not available, defense counsel should explain that the case will be reviewed by a judge advocate and should submit any appropriate matters for consideration by the judge advocate. See R.C.M. 1112. The accused should be advised of the right to apply to the Judge Advocate General for relief under Article 69(b) when such review is available. See R.C.M. 1201(b)(3).

(v) *Examination of post-trial recommendation.* When the post-trial recommendation is served on defense counsel, defense counsel should examine it and reply promptly in writing, noting any errors or omissions. Failure to note

defects in the recommendation waives them. *See* R.C.M. 1106(f).

(F) *Associate or assistant defense counsel.* Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. Although associate counsel acts under the general supervision of the defense counsel, associate defense counsel may act without such supervision when circumstances require. *See*, for example, R.C.M. 805(c). An assistant defense counsel may do this only if such counsel has the qualifications to act as defense counsel. Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel. An assistant defense counsel may not act in the absence of the defense counsel at trial unless the assistant has the qualifications required of a defense counsel. *See also* R.C.M. 805. Unless the contrary appears, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

(e) *Interpreters, reporters, escorts, bailiffs, clerks. and guards.*

(1) *Qualifications.* The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) *Disqualifications.* In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;

(B) A witness;

(C) An investigating officer;

(D) Counsel for any party; or

(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) *Duties.* In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) *Interpreters.* Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

Discussion

The accused also may retain an unofficial interpreter without expense to the United States.

(B) *Reporters.* Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) *Others.* Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) *Payment of reporters, interpreters.* The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

Discussion

See R.C.M. 807 regarding oaths for reporters, interpreters, and escorts.

(f) *Action upon discovery of disqualification or lack of qualifications.* Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first

in session to the convening authority or, if discovered later, to the military judge.

Supreme Court, U.S.
FILED
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(2)

No. 09-418

In the Supreme Court of the United States

JEFF R. WIECHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the military violated petitioner's right to counsel under the Sixth Amendment by refusing to recognize one of petitioner's two appointed military counsel at various pretrial stages before petitioner entered a guilty plea with the assistance of both counsel to the charges at issue.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 10
Bell v. *Watkins*, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983) 9
Chapman v. *California*, 386 U.S. 18 (1967) 6, 11
Coleman v. *Alabama*, 399 U.S. 1 (1970) 9, 10, 11
Ditch v. *Grace*, 479 F.3d 249 (3d Cir.), cert. denied, 552 U.S. 949 (2007) 11
Fields v. *Attorney Gen.*, 956 F.2d 1290 (4th Cir.), cert. denied, 506 U.S. 885 (1992) 8
Kotteakos v. *United States*, 328 U.S. 750 (1946) 7
McMann v. *Richardson*, 397 U.S. 759 (1970) 8
Montejo v. *Louisiana*, 129 S. Ct. 2079 (2009) 8, 9
Neder v. *United States*, 527 U.S. 1 (1999) 10
Pope v. *Illinois*, 481 U.S. 497 (1987) 12
Riley v. *Taylor*, 277 F.3d 261 (3d Cir. 2001) 9
Satterwhite v. *Texas*, 486 U.S. 249 (1988) 10, 11
Tollett v. *Henderson*, 411 U.S. 258 (1973) 7
Trahan v. *Estelle*, 544 F.2d 1305 (5th Cir. 1977) 8

Cases—Continued: Page

United States v. *Basham*, 561 F.3d 302 (4th Cir. 2009), petition for cert. pending, No. 09-617 (filed Nov. 23, 2009) 9

United States v. *Brooks*, 66 M.J. 221 (C.A.A.F. 2008) 6

United States v. *Casseus*, 282 F.3d 253 (3d Cir.), cert. denied, 537 U.S. 852 (2002) 9

United States v. *Cronic*, 466 U.S. 648 (1984) 9, 10

United States v. *Garcia*, 59 M.J. 447 (C.A.A.F. 2004) 3

United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 5, 9, 10

United States v. *Lott*, 433 F.3d 718 (10th Cir.), cert. denied, 549 U.S. 851 (2006) 11

United States v. *Owen*, 407 F.3d 222 (4th Cir. 2005), cert. denied, 546 U.S. 1098 (2006) 11

United States v. *Samuels*, 27 C.M.R. 280 (C.M.A. 1959) 3

United States v. *Walker*, 57 M.J. 174 (C.A.A.F. 2002) 7

United States v. *Williams*, 544 F.2d 1215 (4th Cir. 1976) 9

Washington v. *Recuenco*, 548 U.S. 212 (2006) 10

Williams v. *Jones*, 571 F.3d 1086 (10th Cir. 2009) 9

Constitution, statutes and rules:

U.S. Const. Amend. VI ..... *passim*

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:

Art. 15, 10 U.S.C. 815 4

Art. 27, 10 U.S.C. 827 ..... 2, 5

Art. 27(a)(1), 10 U.S.C. 827(a)(1) 2

Statutes and rules—Continued: Page

Art. 32, 10 U.S.C. 832 ..... 3, 5, 6, 12
Art. 38(b), 10 U.S.C. 838(b) 2
Art. 38(b)(6), 10 U.S.C. 838(b)(6) 2
Art. 92, 10 U.S.C. 892 ..... 1, 2
Art. 107, 10 U.S.C. 907 ..... 1, 2
Art. 133, 10 U.S.C. 933 ..... 1, 2
Art. 134, 10 U.S.C. 934 2
18 U.S.C. 3005 9
28 U.S.C. 1259 7
Courts-Martial R.:
Rule 405(j)(2)(H) 3
Rule 405 discussion 3

In the Supreme Court of the United States

No. 09-418

JEFF R. WIECHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-23a) is reported at 67 M.J. 456.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2009. The petition for a writ of certiorari was filed on October 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a lieutenant colonel in the United States Marine Corps, pleaded guilty at a general court-martial to failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice, in violation of Articles 92, 107, 133

and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 907, 933 and 934. Pet. App. 2a. The court-martial, composed of a military judge, sentenced him to dismissal and confinement for 90 days. *Ibid.* Pursuant to a plea agreement, the convening authority suspended all punishment for 12 months from the date of trial. The United States Navy-Marine Corps Court of Military Appeals (N-MCCA) affirmed. No. NMCCA 200700593, 2008 WL 3540244 (N-M. Ct. Crim. App. Aug. 14, 2008). The United States Court of Appeals for the Armed Forces (CAAF) affirmed. Pet. App. 1a-23a.

1. Article 27(a)(1), 10 U.S.C. 827(a)(1), provides that trial and defense counsel will be detailed for each general or special court-martial and that the Secretaries of the military departments will prescribe regulations governing the detailing of counsel for military defendants. Article 38(b), 10 U.S.C. 838(b), provides that a defendant may be represented by military counsel detailed under Article 27, by military counsel of his own selection if that counsel is reasonably available as determined by regulations, or by civilian counsel at his own expense. Article 38(b)(6), 10 U.S.C. 838(b)(6), provides that a defendant is not entitled to be represented by more than one military counsel, but competent military authority has the discretion to detail an additional military counsel for the defendant.

2. a. Petitioner committed adultery with the wife of a non-commissioned officer. He then lied to military investigators to conceal the affair and encouraged the woman to do likewise. Gov't CAAF Br. 3.

b. In June 2006, Captain Snow, the senior defense counsel at Marine Corps Base Hawaii, learned that charges had been preferred against petitioner and that

he would face an investigation and a hearing under Article 32, 10 U.S.C. 832.[1] Snow detailed himself as defense counsel for petitioner, but requested assistance because he had just one month of experience as defense counsel. The Chief Defense Counsel detailed Lieutenant Colonel Shelburne, a reservist, to serve as petitioner's defense counsel, thereby giving petitioner two appointed military defense counsel at government expense. Pet. App. 4a-5a.

The convening authority denied a defense request to fund Shelburne's assignment on the ground that there was no authority to detail him as defense counsel for petitioner. Shelburne asked the convening authority to continue the Article 32 hearing pending a resolution of the funding issue, but the convening authority denied that request. Pet. App. 5a.

On July 24, 2006, Shelburne appeared at the Article 32 hearing, objected to the proceeding, and moved for a continuance because he did not have sufficient time to prepare for it. The Article 32 investigating officer de-

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[1] Article 32, 10 U.S.C. 832, requires that no charge may be referred to a general court-martial until a thorough and impartial investigation has been made. The investigation includes a hearing at which the accused is entitled to be represented by counsel and has the right to confront adverse witnesses and to present evidence in mitigation. The Article 32 investigating officer has to determine whether "reasonable grounds exist to believe that the accused committed the offenses alleged." Courts-Martial 405 R. (j)(2)(H) (R.C.M.). An Article 32 investigation is designed "to inquire into the truth of the matters set forth in the charges to review, the form of the charges, and to secure information to determine what disposition should be made of the case." See R.C.M. 405 discussion. It is also "a discovery proceeding for the accused and stands as a bulwark against baseless charges." *United States* v. *Garcia*, 59 M.J. 447, 450-451 (C.A.A.F. 2004) (quoting *United States* v. *Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959)).

nied the motions but permitted Shelburne to represent petitioner at the hearing. Afterwards, Shelburne objected to the denial of the continuance and to the admission of certain evidence at the hearing. Pet. App. 5a.

Shelburne and Snow asked to meet with the convening authority to discuss plea negotiations, which included an offer to dispose of the case under the nonjudicial punishment provisions of Article 15, 10 U.S.C. 815. The convening authority declined to meet with the attorneys and refused to accept the written plea proposal because Shelburne's name was on it. The convening authority eventually accepted the plea proposal paperwork for consideration after Snow removed Shelburne's name from it. Pet. App. 5a-6a.

The convening authority denied another request to meet with Shelburne, but conducted a meeting with Snow alone to discuss petitioner's plea proposal. Subsequently, the convening authority effectively rejected petitioner's plea proposal by referring the case to a general court-martial. Pet. App. 6a.

After referral, the military judge held an informal scheduling conference by telephone and he refused to allow Shelburne to participate. Snow filed a motion to have Shelburne recognized as defense counsel. The motion was litigated in front of a different military judge, who granted the motion and ruled that Shelburne had been properly detailed and that Shelburne's detail would be funded by Headquarters, Marine Corps rather than the convening authority. The new military judge also denied petitioner's motions for dismissal of the charges for unlawful command influence and for a new Article 32 hearing. Pet. App. 6a-7a.

On November 27, 2006, the convening authority met with Shelburne to discuss a plea agreement. On Janu-

ary 8, 2007, petitioner entered into a plea agreement with the government. As part of the plea, petitioner expressly waived any defect in the Article 32 investigation and agreed that the charges were properly referred to trial. Pet. App. 7a-8a. Petitioner then pleaded guilty at the court-martial, where he was represented by Shelburne. Petitioner did not raise a Sixth Amendment claim there. *Id.* at 8a-9a.

On appeal, the NMCCA affirmed. Among others, it rejected petitioner's claims that the convening authority's pretrial interference with Shelburne violated petitioner's right to due process and Sixth Amendment right to counsel. 2008 WL 3540244, at *2-*3.

The CAAF granted review on the sole question of whether petitioner was denied his Sixth Amendment right to counsel and then affirmed the N-MCCA. The CAAF held first that the convening authority violated petitioner's Article 27 rights by refusing to recognize Shelburne as petitioner's counsel until the military judge ruled that Shelburne had been properly detailed as petitioner's counsel. Pet. App. 11a-13a. The CAAF found that the convening authority's action had harmed petitioner because Shelburne did not have an opportunity to prepare for the Article 32 hearing, he did not participate in the earlier plea negotiations, and he did not participate in a pretrial scheduling conference. Pet. App. 13a-15a.

The CAAF then considered whether the Article 27 violation violated petitioner's Sixth Amendment right to counsel and whether the error was structural. Pet. App. 15a. The CAAF stated that a structural error occurs when a court has difficulty assessing the impact of the error or the error is so fundamental so as to make harmlessness irrelevant. *Ibid.* (citing *United States* v.

Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006), and *United States* v. *Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008)).

The CAAF held that the error was not structural. It stressed that petitioner had the services of Snow throughout the proceedings, that petitioner agreed to waive any defect in the Article 32 investigation in his plea agreement, and that Shelburne ultimately represented petitioner during the later plea negotiations and at trial despite his exclusion from the earlier plea negotiations. The court concluded that the convening authority's actions were capable of harmless-error assessment, and that they were not so fundamental as to make harmless-error analysis irrelevant. Pet. App. 15a-16a.

The CAAF then assumed, without deciding (Pet. App. 17a), that a Sixth Amendment violation had occurred, but found that the error was harmless beyond a reasonable doubt. *Id.* at 17a-18a (citing *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). The CAAF emphasized that Shelburne represented petitioner throughout the trial and post-trial proceedings and that he negotiated a plea agreement for petitioner despite his exclusion from the initial negotiation sessions. Further, the CAAF stated, petitioner had shown no harm from Shelburne's exclusion from the initial scheduling conference, and he did not claim that his guilty plea was involuntary or otherwise deficient. *Id.* at 16a-18a.

Judge Ryan concurred in the result. She agreed that the convening authority's actions violated petitioner's rights under military law and that petitioner was not prejudiced by the error, but she disagreed with the majority's assumption that there was a constitutional error. Instead, she would have held that no Sixth Amendment error occurred because petitioner was represented by

one competent counsel at all times despite the interference with Shelburne. Pet. App. 18a-23a.

ARGUMENT

Petitioner contends (Pet. 3-15) that the military's interference with Sheiburne's representation during various pretrial stages of the prosecution constituted a structural violation of petitioner's Sixth Amendment right to counsel that requires automatic reversal of his conviction.[2] There is no merit to that claim, and it does not warrant further review.

1. As an initial matter, petitioner's Sixth Amendment claim is foreclosed by his unconditional guilty plea. Under this Court's decision in *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), a guilty plea constitutes "a break in the chain of events which has preceded it in the criminal process." Accordingly, a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a defendant seeking to raise such "antecedent constitutional violations," *id.* at 266, is limited to attacks on the

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[2] The petitioner (Pet. 3) raises only a Sixth Amendment claim, and he does not assert any independent violation of the UCMJ. Nor could petitioner raise a statutory claim. 28 U.S.C. 1259 limits this Court's review to "[d]ecisions" of the CAAF. The CAAF granted review only on petitioner's Sixth Amendment claim (Pet. App. 2a), and decided that issue only.

In any event, consideration of the independent violation of the UCMJ would yield the same result. The test for non-constitutional error is "'whether the error itself had substantial influence' on the findings." See *United States* v. *Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)). That test would be easily met given that the more stringent harmless error test for constitutional errors was met in this case.

knowing, voluntary, and intelligent character of the guilty plea, and when a plea is counseled, he must ordinarily establish that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Because petitioner does not allege ineffective assistance of counsel in connection with his guilty plea, that plea bars any effort to challenge his claim of an antecedent violation in the deprivation of counsel at earlier proceedings. See *Fields* v. *Attorney Gen.*, 956 F.2d 1290, 1296 (4th Cir.) (claim of denial of counsel at a critical stage was barred by the defendant's counseled plea of guilty; "[H]is claim concerns an alleged constitutional deprivation that occurred prior to Fields' guilty plea and is unrelated to it. *Tollett* therefore bars this claim."), cert. denied 506 U.S. 885 (1992); *Trahan* v. *Estelle*, 544 F.2d 1305, 1309 (5th Cir. 1977) ("[S]ince Trahan pleaded guilty with at least some advice from court appointed counsel, any question with reference to his uncounselled meeting with the district attorney, two or three days previously, was not open to attack.").

2. In any event, petitioner's claim lacks merit even if the Court were to look past the effect of the guilty plea. First, the CAAF majority's assumption that a Sixth Amendment violation occurred was unwarranted; no Sixth Amendment violation occurred in this case. A defendant's right to counsel under the Sixth Amendment includes the right to have counsel present at all critical stages of the criminal proceedings. *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2085 (2009); *United States* v.

Cronic, 466 U.S. 648, 659 (1984).[3] The right to counsel also includes a right to counsel of choice, but only for those defendants who retain their own counsel. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006). A defendant who has counsel appointed for him does not have a right to counsel of choice. See *id.* at 151; *Montejo*, 129 S. Ct. at 2084; *United States* v. *Basham*, 561 F.3d 302, 324 (4th Cir. 2009), petition for cert. pending, No. 09-617 (filed Nov. 23, 2009). Further, the constitutional right to appointed counsel is limited to one attorney; a defendant has no constitutional right to the appointment of a second or an additional attorney for the accused. See, *e.g.*, *Riley* v. *Taylor*, 277 F.3d 261, 273 n.1, 306 (3d Cir. 2001); *Bell* v. *Watkins*, 692 F.2d 999, 1008-1009 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983). A federal statute may provide for the appointment of an additional counsel for the accused. See 18 U.S.C. 3005 (providing for the appointment of an additional counsel in a capital case). But when an accused is denied his statutory right to additional counsel, that is only a statutory violation, not a Sixth Amendment violation. *United States* v. *Casseus*, 282 F.3d 253, 256 (3d Cir.) (violation of Section 3005), cert. denied, 537 U.S. 852 (2002); *United States* v. *Williams*, 544 F.2d 1215, 1218 (4th Cir. 1976) (same).

Here, petitioner was represented by appointed counsel Snow in addition to Shelburne, and petitioner does not claim either that the military violated his right to Snow's services, or that Snow rendered ineffective assis-

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[3] The Court may assume that plea negotiations and the preliminary hearings in this case constitute "critical stages" for right-to-counsel purposes. See *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (preliminary hearing); *Williams* v. *Jones*, 571 F.3d 1086, 1090-1091 (10th Cir. 2009) (plea negotiations).

tance of counsel.[4] Accordingly, petitioner was afforded his Sixth Amendment right to counsel at all critical stages. Therefore, the military's violation of petitioner's right to additional counsel Shelburne under military law was irrelevant for Sixth Amendment purposes.

Even if there were a Sixth Amendment violation in this case, the error was harmless. First, no structural error occurred here. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). When properly preserved, a structural error is prejudicial per se and requires reversal of the defendant's conviction. *Washington* v. *Recuenco*, 548 U.S. 212, 218-219 (2006). A structural error is rare; most constitutional errors are subject to harmless error review. See *ibid.*; *Neder* v. *United States*, 527 U.S. 1, 8 (1999).

A violation of a defendant's Sixth Amendment right to counsel is a structural error if the error "affected—and contaminated—the entire criminal proceeding." *Satterwhite* v. *Texas*, 486 U.S. 249, 257 (1988). In addition, a complete denial of the right to retained counsel of choice at trial is prejudicial per se and requires reversal of the defendant's conviction. *Gonzalez-Lopez*, 548 U.S. at 148-151. But a violation of the right to counsel at pretrial proceedings alone does not affect the entire criminal trial, so an error in that context is a non-structural one that is tested for harmlessness. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (preliminary hear-

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[4] Petitioner notes (Pet. 3, 12-13) that Snow was relatively inexperienced compared to Shelburne, but Snow's lack of experience would not have justified a presumption of ineffectiveness under the Sixth Amendment. See *Cronic*, 466 U.S. at 665. Nothing in the record would support a claim that Snow was ineffective in this case.

ing); *Ditch* v. *Grace*, 479 F.3d 249, 253-255 (3d Cir.) (preliminary hearing), cert. denied, 552 U.S. 949 (2007); *United States* v. *Lott*, 433 F.3d 718, 722-724 (10th Cir.) (evidentiary hearing), cert. denied, 549 U.S. 851 (2006); *United States* v. *Owen*, 407 F.3d 222, 226-229 (4th Cir. 2005) (arraignment), cert. denied, 546 U.S. 1098 (2006). Because the errors alleged in this case occurred only at pretrial stages of petitioner's prosecution and did not affect the entire criminal proceeding, they were non-structural errors that the CAAF correctly tested for harmlessness.[5]

A constitutional error is harmless if the government establishes beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Satterwhite*, 486 U.S. at 256; *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In evaluating harmlessness, courts consider many factors, including whether, and to what extent, the government obtained any evidence against the defendant at the proceeding in which counsel was denied, *Coleman*, 399 U.S. at 10, the strength of the government's untainted evidence, *Chapman*, 386 U.S. at 25-26; *Ditch*, 479 F.3d at 255-257, and whether counsel had sufficient time to prepare for trial. *Owen*, 407 F.3d at 229.

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[5] Petitioner's reliance (Pet. 10-11) on *Gonzalez-Lopez* is misplaced for two reasons. First, *Gonzalez-Lopez*'s holding that a denial of the right to counsel of choice is not subject to harmless-error review does not apply here because petitioner was represented by appointed counsel, not retained counsel. Second, in *Gonzalez-Lopez*, the trial court disqualified the defendant's retained counsel before trial and that counsel was therefore absent from the trial and sentencing proceedings. In marked contrast, both counsel represented petitioner during the later pretrial stages, the plea negotiations, and the entry of the plea.

Here, the alleged violations that occurred at the pretrial stages of the proceedings had no effect on petitioner's subsequent decision to plead guilty. The denial of petitioner's motion for a continuance of the Article 32 hearing to allow Shelburne time to prepare was harmless because petitioner ultimately agreed that the case was properly referred to trial and he expressly waived any defect in the Article 32 investigation as part of his plea agreement. Shelburne's exclusion from an initial pretrial scheduling session was an insubstantial error that did not affect the outcome. Further, the convening authority's initial refusals to enter into plea negotiations with Shelburne was cured when he subsequently did negotiate with Shelburne, which led to the plea agreement between the convening authority and petitioner. Petitioner has not claimed that his guilty plea was involuntary or that Shelburne had insufficient time to negotiate a favorable plea for him. Indeed, petitioner raised no Sixth Amendment claim at the court-martial where he pleaded guilty. Finally, petitioner was represented by Snow at all critical stages of the prosecution.[6]

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[6] Petitioner's fact-bound (Pet. 11-14) disagreement with the CAAF's harmless-error ruling warrants no further review. The CAAF expressly applied the *Chapman* harmless-error test (Pet. App. 17a), and it is primarily the task of a court of appeals, not this Court, to conduct harmless-error review. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that this Court conducts harmless-error review "sparingly").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009